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Twenty-second session

SUMMARY RECORD OF THE 408th MEETING

Held at the Vienna International Centre, Vienna,
on Friday, 19 May 1989, at 9.30 a.m.

Chairman: Mr. RUZICKA (Czechoslovakia)

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The meeting was called to order at 9.35 a.m.

DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (continued) (A/CN.9/298, A/CN.9/319 and Add.1-4, A/CN.9/321; A/CN.9/XXII/CRP.5)

Article 2 (continued)

1. Mr. RENGER (Federal Republic of Germany), referring to his delegation's proposal for amendment of subparagraphs (a) and (b) of paragraph (1) (A/CN.9/XXII/CRP.5, page 2), said that it was designed to bring the language of the draft Convention into line with that used in the Vienna Convention on the Law of Treaties and in other more recent conventions.

2. Current practice was to use the term "contracting State" to designate States which had consented to be bound by a treaty, whether or not that treaty had entered into force. The term "State party", on the other hand, was used to refer to States bound by the treaty and for which the treaty was in force.

3. Mr. SEVON (Observer for Finland) suggested that the amendments proposed by the Federal Republic of Germany - which he supported - involved only a matter of drafting. He proposed that they be referred to the Drafting Group.

4. It was so decided.

Article 1 (continued)

5. Ms. van der HORST (Netherlands) recalled her suggestion, made at the previous meeting, that in paragraph (c) the words "by the operator" should be inserted after the words "the place of destination are identified".

6. The CHAIRMAN observed that the concern of the Netherlands delegation to bring out the key role of the operator appeared to have been met in the Russian version of the paragraph.

7. Mr. BERAUDO (France), supported by Mr. TANASESCU (Observer for Romania), Mr. FALVEY (United States of America) and Mr. POHUNEK (Czechoslovakia), said that he preferred the Working Group's text, which had the merit of objectivity. The Netherlands wording, by mentioning the operator, introduced a subjective factor. It had the further drawback that different criteria might be applied in different places.

8. Mr. VINCENT (Sierra Leone) expressed his support for the Netherlands proposal.

9. Mr. RAO (India) proposed the deletion of the words "identified as being" in paragraph (c), as they appeared to serve no purpose. If, however, the intention was that operators should be provided with a communication showing that the places of departure and destination were located in two different States, then the present wording was not adequate.

10. Mr. BONELL (Italy) said that it was important for the operator to be informed of the situation Some means should be provided of bringing to his attention the international character of a consignment. The Indian representative's point had been considered by the Working Group at some length.

11. Mr. KATZ (International Trade Law Branch) drew attention to the Working Group's discussion of paragraph (c), which was referred to in paragraphs 131 to 135 of document A/CN.9/287. One suggestion made had been that the Convention should not apply if the operator could prove that he did not know that the goods were involved in an international transport operation. Another suggestion had related to the means by which the operator should be enabled to determine whether or not they were involved in international carriage and to the various ways in which identification might be made, i.e. from accompanying documents or markings on the goods. There had been some discussion as to whether the operator's determination should be considered an objective or a subjective criterion.

12. Mr. RAO (India) said that, following the explanation just given, he was all the more convinced that the words "identified as being" were superfluous: they merely led to the question "who identifies, and to whom?". Accompanying documents and markings would show that two different States were involved even without the words to which he objected. However, he would not necessarily press this proposal.

13. Mr. CHAFIK (Egypt) said that he supported the Indian representative's proposal. A text which required clarification could not be regarded as acceptable and he felt the Drafting Group should be so informed.

14. Mr. MOORE (Nigeria) also saw merit in the Indian proposal. If the aim was to produce an objective rather than a subjective provision, then the deletion of the words to which the Indian delegate objected was desirable.

15. Mr. FALVEY (United States of America) disagreed. In his view, the words "when the goods are taken in charge by the operator" were linked to the words in the previous line "identified as being". Deletion of those words would introduce an undesirable element of subjectivity.

16. Mr. KATZ (International Trade Law Branch) said that there would be a subjective test if goods were considered to be involved in international carriage only if the operator knew of the identification; whereas an objective test would not look to what an operator knew or believed but only to what he could deduce from the facts. Whether or not the operator in fact made the identification would be irrelevant in an objective test, as the essential point was whether or not he had objective means of verifying the type of transport operation that was involved.

17. Mr. YUAN Zhenmin (China) said that he was inclined to support the Indian representative's proposal. However, the point involved was not, in his view, a matter of substance and could be referred to the Drafting Group.

18. Mr. INGRAM (United Kingdom) endorsed the United States representative's remarks: the operator had to have means of knowing that international carriage was involved. He therefore opposed the deletion of the words "identified as being".

19. Mr. POHUNEK (Czechoslovakia) suggested that the word "identified" might be replaced by the word "identifiable". That would meet the criterion of objectivity and at the same time avoid the question as to who it was that made the identification.

20. Ms. van der HORST (Netherlands) thought that the objective element would be preserved if the text read: "... identified by the operator as being located ...".

21. Mr. OCHIAI (Japan) considered the present text satisfactory and suggested that it be referred to the Drafting Group.

22. Mr. SCHROCK (Federal Republic of Germany) said that he had no objection to the substitution of the word "identifiable" for "identified", which was a purely drafting matter. However, he could not agree to the addition of the words proposed by the Netherlands representative.

23. The CHAIRMAN noted that a majority of speakers appeared to favour an objective criterion. He suggested that article 1, paragraph (c), as well as the other paragraphs of the article, should be referred to the Drafting Group, which might decide whether any drafting amendments were necessary.

24. It was so decided.

Article 4

25. The CHAIRMAN invited the Commission to consider paragraph (1) of article 4, proposals and comments relating to which were to be found in document A/CN.9/319 and its addenda and in document A/CN.9/XXII/CRP.5.

26. Mr. SCHROCK (Federal Republic of Germany), introducing his country's proposed amendment to paragraph (1) (A/CN.9/XXII/CRP.5, pages 2 and 3) said that the Working Group's text envisaged two types of documents, one produced by the customer and the other issued by the operator himself. One of the objects of his country's proposal was to bring subparagraphs (a) and (b), which dealt respectively with those two cases, into line with each other by including a reference to identification of the goods in subparagraph (b) and a reference to the date of receipt in subparagraph (a). As for the reservation clause whose addition to subparagraph (a) his country proposed, its object was to enable the operator to sign the document produced by the customer even if he had certain reservations concerning it. There would thus be less risk of the operator's falling within the scope of article 4, paragraph (2).

27. Mr. BONELL (Italy) said that paragraph (1) allowed the operator the choice between signing a document produced by the customer (but, in most cases, issued by the carrier) and issuing a signed document of his own. The differences between the requirements set out in subparagraphs (a) and (b), respectively, were not inconsistencies but reflected the different natures of the two solutions offered. If the operator had the slightest doubt as to the accuracy of the particulars contained in the document produced by the customer, he was perfectly free to opt for the solution in subparagraph (b) without any risk of incurring the legal effects set out in article 4, paragraph (2).

28. Mr. SWEENEY (United States of America), while agreeing with the substance of the Italian representative's remarks, said that, like the representative of the Federal Republic of Germany, he wished to increase the parallelism between subparagraphs (a) and (b). He therefore suggested that the words "in so far as they can be ascertained by reasonable means of checking", which already appeared in subparagraph (b), should be inserted also in subparagraph (a). The words "and stating their condition and quantity" could, in his view, be omitted from that subparagraph, which would then read as follows: "Acknowledge his receipt of the goods by signing a document produced by the customer identifying the goods and stating their condition and quantity in so far as they can be ascertained by reasonable means of checking, or". The proposed change would make it quite clear that the opening of sealed containers was not required in either case, thus bringing the provision into line with an important principle adopted at the Hamburg Conference. Referring to the bracketed passages in the Federal Republic of Germany's proposal, he suggested that their discussion should be deferred pending the consideration of article 6, as a result of which that part of that proposal might become redundant.

29. Mr. YUAN Zhenmin (China) announced that his delegation had handed to the Secretariat a written proposal calling for more clarification of the meaning of the expressions "reasonable means of checking" in article 4, paragraph (1) (b) and "apparently good condition" in article 4, paragraph (2).

30. Mr. TEPAVITCHAROV (Bulgaria) said that he was in favour of introducing a reservation clause in subparagraph (a). That was the approach which had been adopted in the case of article 16, paragraph 1, of the Hamburg Rules. In the absence of such a clause, disputes were liable to arise in practice.

31. Mr. RUSTAND (Observer for Sweden) agreed with the representative of Italy that if the operator suspected the particulars in the document produced by the customer to be inaccurate he was at liberty to choose the alternative indicated in subparagraph (b). He wished for the present to reserve his delegation's position on the United States proposal to insert in subparagraph (a) a reference to reasonable means of checking.

32. Mr. TARKO (Observer for Austria) said that he understood the point of the Federal Republic of Germany's proposal for a reservation clause but agreed with previous speakers that such a clause was not strictly necessary. The Working Group's text was satisfactory in his view and the addition of further detail would make it unwieldy. With regard to the United States proposal, he would have no objection to adding the words "in so far as they can be ascertained by reasonable means of checking" to subparagraph (a), but he saw no reason why the words "and stating their condition and quantity" should be deleted from that subparagraph.

33. Mr. ENDERLEIN (Observer for the German Democratic Republic) said that he supported the Federal Republic of Germany's proposal to include the words "and the date thereof" between the word "goods" and the words "by signing" in subparagraph (a). He agreed with the United States representative that the words "and stating their condition and quantity" were inappropriate in the context of subparagraph (a). He suggested that the expression "produced by the customer" in that subparagraph might usefully be replaced by the words "presented by the customer".

34. Mr. DJIENA (Cameroon) said that the Federal Republic of Germany's proposal for amendment of paragraph (1) created a number of practical problems. The reference to the "number of packages or pieces" was too detailed and it was not stated whether, in the event of a "reservation" by the operator, the client could express his disagreement. Nor was the legal value of such a reservation clear. The carrier or client, too, might wish to make a reservation. It was important for the client not to be at the mercy of the operator, whose judgement might be subjective or mistaken. Despite its weaknesses, the text prepared by the Working Group was simple, logical and easy to apply and it therefore had his delegation's support.

35. With regard to the United States proposal, he pointed out that the logic in paragraph (1) (a) differed from that in paragraph (1) (b). In the former case, the operator signed a document presented to him whereas in the latter he himself issued a document, so that reasonable means of checking were necessarily involved.

36. Mr. GRIFFITH (Observer for Australia) supported the proposal to include in subparagraph (a) a reference to the date of receipt but felt that the term "a dated document" might be preferable to the expression "and the date thereof". He also supported the United States proposal to add the words "in so far as they can be ascertained by reasonable means of checking" to paragraph (1) (a).

37. Mr. SCHROCK (Federal Republic of Germany) said that the words in square brackets in the text his country proposed for paragraph (1) might more usefully be discussed within the context of article 6. Some further improvement of article 4, paragraph (1) seemed necessary in order to make it clear that the choice between signing or producing a document lay with the operator. The word "shall" in the opening sentence of the paragraph might give rise to confusion. In response to the comment that the requirements laid down under his country's proposal might be too onerous for the operator, he suggested that the word "must" before the words "insert in the document" might be replaced by "can" or "may". He recognized that the text proposed was rather long and that a shorter text might be preferable. That proposed by the United States met some of his country's concerns, but he stressed the importance of including a reference to the date of receipt of the goods. He supported the replacement of the word "produced" in subparagraph (a) by the word "presented".

38. Mr. BERAUDO (France) said that the Hamburg Rules, on which the proposal of the Federal Republic of Germany was based, were of only limited assistance in connection with article 4 since the reference in those Rules to the bill of lading was applicable only to paragraph (1) (b), which dealt with the sole instance when the operator issued such a document. He was not in favour of the United States proposal since it would tend to reverse the burden of proof in paragraph (1) (a). In the Working Group's draft text, the burden of proof lay with the person issuing the document. If, in accordance with the United States proposal, a parallelism were established between subparagraphs (a) and (b), the result would be to make it incumbent on the transport terminal operator to establish the existence of inaccuracies in the customer's document, i.e. in a document not prepared by himself. According to the Working Group's text, the operator signed for reception of the goods but did not guarantee the accuracy of the document describing their condition or quantity because that document had been drawn up by a third party. If the operator were to be given, in paragraph (1) (a), the right or duty to check the conformity of the goods with the document describing them, the burden of proof would be reversed and the operator would then be obliged to establish the existence of errors or inaccuracies. In the case of paragraph (1) (b) the operator, as in the Hamburg Rules, issued the document; he was therefore responsible for its content, and hence for checking the condition and quantity of the goods to a "reasonable" extent. In the event of a dispute it was up to him to prove any inaccuracies. The text before the Commission was therefore logical and should be maintained since it was based on precise legal and practical considerations. However, he supported the proposal to add a reference to the date of receipt in paragraph (1) (a) and suggested that the words "and presented" should be inserted after the word "produced", as it might be preferable to use both verbs.

39. Mr. OCHIAI (Japan) expressed agreement with the representative of Italy's remarks and accordingly supported the maintenance of the present text, with the two suggested amendments to paragraph (1) (a), namely the addition of the words "and the date thereof" and the replacement of the word "produced" by "presented".

40. Mr. RAO (India) said that he approved the text of subparagraph (a) as drafted by the Working Group, but not for the reasons given by the representative of France. On the question whether it was the operator or the customer who exercised the option offered in paragraph (1), he thought the English text made it clear that the choice lay with the operator. He found it difficult to accept the French representative's view that the burden of proof differed in subparagraphs (a) and (b). In his view, the burden of proof lay in both cases with the operator. He believed it would be wrong to omit a reference to the condition of the goods in subparagraph (a). It was implicit in that clause that the operator, in acknowledging receipt of the goods, would examine them and, if dissatisfied, issue

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a document himself in accordance with subparagraph (b). The Working Group's text was therefore satisfactory, although he agreed that the date of receipt should be mentioned in subparagraph (a) and also approved the addition to that paragraph of the words "in so far as they can be ascertained by reasonable means of checking".

41. Mr. SZASZ (Hungary) said that his delegation also preferred the term "presented" to "produced" in subparagraph (a) and the addition of a reference to the date of receipt. He could not agree with the French representative's interpretation concerning the burden of proof. Under most systems of law, the placing of a signature on a receipt for goods presupposed examination of the goods. There were no grounds whatsoever for reversal of the burden of proof and in consequence the United States proposal to insert in subparagraph (a) the words "in so far as can be ascertained by reasonable means of checking" was appropriate. After careful consideration he was unable to support the proposal of the German Democratic Republic to delete the words "and stating their condition and quantity" in subparagraph (a).

42. Mr. ABASCAL (Mexico) said that, since it was clear that the operator had the option of either signing the receipt presented to him or preparing his own receipt document, there was no need for the amendment proposed by the United States. His delegation accordingly endorsed the text proposed by the Working Group.

43. Mr. EYZAGUIRRE (Chile) said that his delegation also preferred the verb "presented" to the verb "produced". While it was clear that the operator was offered an option, he supported the United States proposal to insert in subparagraph (a) the words "in so far as they can be ascertained by reasonable means of checking". He shared the view of the Indian and Hungarian delegations that any person who signed a receipt was responsible to a reasonable degree for the accuracy of its content.

44. Mr. POHUNEK (Czechoslovakia) said he could not agree that the present wording imposed an obligation on the operator to verify the accuracy of the description of the goods on the customer's document. His signature of the latter merely confirmed his receipt of the goods as described. To avoid ambiguity, he therefore proposed that the phrase "identifying the goods and stating their condition and quantity" in subparagraph (a) should be replaced by "in which the goods and their state and condition are identified".

45. Ms. van der HORST (Netherlands) suggested that the word "customer" in the introductory part of paragraph (1) should be replaced by the words "other party to the contract".

46. Mr. CHAFIK (Egypt) said that paragraph (1), as proposed by the Working Group, was precise, clear and elegant. There was no need for exact parallelism between subparagraphs (a) and (b). What was esssential was agreement between the two parties as to who was to prepare the receipt document. His delegation had no objection to replacing the word "produced" by "presented" or to the insertion of a reference to the date of receipt. The phrase "without unreasonable delay" in the introductory part of the paragraph was liable to subjective interpretation and might well be replaced by the word "promptly".

47. Mr. INGRAM (United Kingdom) said he believed the Czechoslovak representative's interpretation of the meaning of subparagraph (a) was correct. The addition proposed by the United States delegation was therefore inappropriate. He preferred the present formula "without unreasonable delay" to the word "promptly".

48. Mr. HORNBY (Canada) said that the present text of paragraph (1) was satisfactory, although the addition of a reference to the date and the replacement of the word "produced" by "presented" represented an improvement.

49. Mr. MOORE (Nigeria) said that the operator must be given the option to choose, as in the text proposed by the Working Group, whether to sign the customer's receipt or to prepare his own. He supported the proposed amendments relating to the word "produced" and a reference to the date of receipt.

50. Mr. ZUBEIDI (Libyan Arab Jamahiriya) said that the meaning of subparagraphs (a) and (b) was clear and the text should therefore be left unchanged. The United States proposal would be acceptable to his delegation if the phrase "in so far as they can be ascertained by reasonable means of checking" were replaced by the words "established by reasonable means".

51. Mr. LEBEDEV (Union of Soviet Socialist Republics), drawing attention to his Government's comments on article 4 (A/CN.9/319, page 12), said that the Commission had to decide on the meaning to be given to the signature of a receipt as referred to in paragraph (1) (a): whether signature merely confirmed receipt of the goods as described, or whether, once the operator had signed a receipt, he was not subsequently entitled to contest the condition and quantities shown thereon. The Czechoslovak delegation had made an intermediate proposal under which the signature related only to a document in which the condition of the goods was specified.

52. The Commission should recognize that the operator was entitled under paragraph (1) (b) to indicate merely the apparent condition of the goods. That was a practically meaningful provision which fitted in well with article 4, paragraph (2).

The meeting rose at 12.35 p.m.